STATE OF MICHIGAN

COURT OF APPEALS

BANK ONE, MICHIGAN, a/k/a BANK ONE, N.A.,

Plaintiff/Counterdefendant-Appellee,

v

KARKOUKLI'S, INC.,

Defendant/Counterplaintff-Appellant,

and

ETCHEN GUMMA, LTD.,

Defendant.

UNPUBLISHED
March 1, 2005

No. 248023
Oakland Circuit Court
LC No. 01-036714-CH

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant Karkoukli's, Inc. appeals as of right an order of voluntary dismissal following the trial court's order granting plaintiff's motion for summary disposition as to defendant's counterclaims against plaintiff. Defendant asserts that there were genuine issues of material fact whether plaintiff slandered title to defendant's property and regarding whether plaintiff breached a fiduciary duty to defendant. We affirm.

We first address defendant's contention that there was a genuine issue of material fact regarding whether plaintiff slandered title to defendant's property. We disagree.

We review a decision on a motion for summary disposition de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). The party moving for summary disposition has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Smith*, *supra* at

446; *Glass v Goeckel*, 262 Mich App 29, 33; 683 NW2d 719, lv gtd 471 Mich 904 (2004). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

Slander of title serves as a remedy for malicious publication of false statements that disparage a plaintiff's right in property. *B & B Investment v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). To establish slander of title, a plaintiff must show falsity, malice, and special damages. *Id.* Malice may not be inferred from the filing of an invalid lien. *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990). A plaintiff must show that a defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury. *Id.*

The parties do not dispute that plaintiff had a construction mortgage lien on defendant's two adjoining lots, Lot 20 and Lot 6, and that defendant defaulted on the construction loan. There is also no dispute that the plaintiff caused the mortgage to be foreclosed at a sheriff's sale, that plaintiff was the successful bidder at $1.8 million, and that the sheriff's deed transferred title not to the entirety of the mortgaged property, but only to Lot 20. Plaintiff asserts that it had intended to extinguish defendant's debt only by purchasing both lots at the foreclosure sale, and that it failed to secure both lots only because of an error in the sheriff's deed. Plaintiff further asserts that because of the erroneous legal description in the sheriff's deed, it acted appropriately when it filed an action seeking to set aside the foreclosure sale and sheriff's deed and to revive the mortgage, and that it also had no obligation to release its mortgage lien on Lot 6. Defendant argues that plaintiff's failure to release its mortgage lien on Lot 6, after the foreclosure sale of Lot 20 discharged defendant's debt to plaintiff, constituted slander of title. Defendant further asserts that the sheriff's deed was not mistaken in failing to include Lot 6 in the foreclosure because pursuant to MCL 600.3224, plaintiff was required to sell the two lots separately. We find plaintiff's arguments to be more persuasive.

MCL 600.3224 provides:

> If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as 1 parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the cost and expenses allowed by law but if distinct lots be occupied as 1 parcel, they may in such case be sold together.

Whether property consists of one parcel is a practical question depending on the circumstances. *Cox v Townsend*, 90 Mich App 12, 16; 282 NW2d 223 (1979). "The premises constitute one parcel if held, treated, occupied or used as such at the time of the foreclosure sale." *Id.* The party alleging that the lots should be sold separately has the burden of proving that the lots were not occupied or intended to be used as one parcel. *Id.*

Defendant failed to meet its burden to show that the two lots should be sold separately. The evidence, including deposition testimony of defendant's president, established that the two lots were intended to form one parcel of land on which was to be built a gas station/convenience

store/restaurant, all owned and operated by defendant. Because the two lots were held and intended to be used as one parcel of land at the time of the foreclosure sale, plaintiff was not required to sell each lot separately at foreclosure. Therefore, plaintiff's continued lien on Lot 6 was not invalid as a violation of MCL 600.3224.

Even if plaintiff's lien on Lot 6 violated MCL 600.3224, the invalidity of a lien on property is not sufficient proof to establish a claim for slander of title. *Stanton, supra* at 262. To avoid summary disposition, defendant must come forward with evidence that plaintiff, in refusing to discharge its lien on the second lot, acted with malice, with the intent to injure defendant. Defendant has failed to present any evidence creating a genuine issue of material fact as to whether plaintiff's failure to discharge the lien was due to any reason other than plaintiff's reasonable assertion of mistake in the conduct of the foreclosure sale. Accordingly, the trial court properly granted summary disposition on defendant's claim for slander of title.

Defendant next argues that the trial court erred in granting summary disposition on defendant's assertion that plaintiff owed defendant a fiduciary duty. Again, we disagree.

A fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another. *Vicencio v Ramirez,* 211 Mich App 501, 508; 536 NW2d 280 (1995). Some examples are: trustees to beneficiaries, guardians to wards, attorney to client, and doctors to patients. *Portage Aluminum Co v Kentwood Nat'l Bank,* 106 Mich App 290, 294; 307 NW2d 761 (1981). A breach of fiduciary duty requires that the plaintiff reasonably reposed faith, confidence, and trust in the fiduciary. *Rose v Nat'l Auction Group,* 466 Mich 453, 469; 646 NW2d 455 (2002). This Court has been reluctant to extend the cause of action for breach of fiduciary duty beyond the traditional context. See *Teadt v Lutheran Church Missouri Synod,* 237 Mich App 567, 574-581; 603 NW2d 816 (1999). A fiduciary relationship does not generally arise in the bank/lender relationship. *Farm Credit Svcs of Michigan's Heartland, PCA v Weldon,* 232 Mich App 662, 680; 591 NW2d 438 (1998).

Defendant asserts that plaintiff owed it a fiduciary relationship because plaintiff's loan officer engaged in daily discussions with defendant's president, an inexperienced small businessman, regarding the construction project and the negotiations for the sale of the property to a third party. Defendant further asserts that defendant's president relied on plaintiff's loan officer for advice, that the loan officer participated in the negotiations for the sale of the property, that the loan officer encouraged defendant to accept an offer to buy the property, that plaintiff required defendant to hire a consultant to oversee the demolition and construction project, that plaintiff reviewed and approved invoices submitted by the consultant, and that the loan officer had discussions with representatives of the company proposing to purchase defendant's property. Even assuming all of these allegations to be true, they are insufficient as a matter of law to establish a fiduciary relationship between plaintiff and defendant.

In *Ulrich v Federal Land Bank,* 192 Mich App 194, 196-197; 480 NW2d 910 (1991), this Court held that plaintiff's claims of their inexperience and reliance upon the bank were not sufficient to state a claim for breach of fiduciary duty. In *Farm Credit Svcs, supra* at 680-681, this Court found that the mere fact that plaintiff had maintained control over the terms of the defendants' loan repayment and participated in discussions regarding what crops to grow was insufficient as a matter of law to establish a fiduciary relationship between lender and borrower. Defendant has failed to allege facts sufficient to distinguish this case from *Ulrich* and *Farm*

Credit Svcs, and accordingly, we conclude the trial court correctly found that defendant failed to show a genuine issue of material fact as to whether there was a fiduciary relationship between defendant and plaintiff.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens